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 DAW GYAN  
 v.  
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 PAGE, C.J.

Now, it is obvious that at the time when the two lower houses were separated from the upper house in or about 1923, it was the common intention of both the vendor and the purchaser that thereafter the night soil buckets should be taken to the West Moat Road along the path through the upper compound in the manner in which they had been taken before, and, having regard to the authorities to which reference has been made, I am of opinion that an implied easement to that effect resulted from and was ancillary to the conveyance of the two lower houses by Mg. Mg. Thet in 1923.

For these reasons, in my opinion, the appeal fails and must be dismissed with costs.

BA U, J.—I agree.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Mosely.*

MOHAMED ISMAIL

v.

KING-EMPEROR.\*

1935  
 July 17.

*Cognizable offence—Power of arrest without warrant not unqualified—Officer acting independently—Subordinate officer deputed by superior officer to arrest—Authority in writing necessary—Authority to be shown to arrested person—Criminal Procedure Code (Act V of 1898), ss. 54, 56—Bona fide but unauthorized arrest by police officer—Right of private defence.*

S. 54 of the Code of Criminal Procedure does not give an unqualified power in all cases to any police officer to arrest, without an authorization in writing, a person concerned in a cognizable offence. The provisions of s. 54 are limited by those of s. 56 of the Code. A police officer may without a warrant arrest any person concerned in a cognizable offence, provided the officer is acting on his own initiative, or independently in the course of his duty. But where a subordinate police officer is not

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\* Criminal Appeal No. 780 of 1935 from the order of the Honorary Magistrates, Rangoon, in Criminal Trial No. 393 of 1935.

acting independently, but is merely deputed by a superior officer to arrest someone concerned in a cognizable offence, he must be given his order in writing by the superior officer, specifying the person to be arrested and the offence or other cause for which the arrest is to be made. The subordinate officer must notify to the person to be arrested the substance of the order and, if so required by such person, show him the order.

*Queen v. Sheik Emoo*, (1869) W.R. (Cr. Rulings) 20—*referred to*.

Where a police officer acting *bona fide* under colour of his office arrests a person but without authority, the person so arrested has no right of self-defence against the officer.

*Queen-Empress v. Dalip*, I.L.R. 18 All. 246—*referred to*.

MOSELY, J.—The appellant, Mohamed Ismail, was sentenced to six months' rigorous imprisonment under section 353, Indian Penal Code, for assaulting a police constable when the latter was trying to arrest him as he was wanted on a report of theft made under section 380, Indian Penal Code. The investigating officer, Sub-Inspector of Police Maung Tun Tin (p.w. 3), had given verbal orders only to the arresting constable, Gunoo Meah, and had not given Gunoo Meah an order in writing specifying the person to be arrested and the offence for which the arrest was to be made, *vide* the provisions of section 56 (1) of the Code of Criminal Procedure.

The Honorary Magistrates who tried the case were of the opinion that the arrest was in order under the provisions of section 54 (1) of the Code of Criminal Procedure, which provides that any police officer may, without a warrant, arrest any person who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists of his having been so concerned. "Cognizable offence" is defined in section 4 (f) of the Code of Criminal Procedure, as an offence for which a police officer may arrest without warrant.

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It is clear however that section 54 of the Code of Criminal Procedure does not give an unqualified power in all cases to any police officer to arrest without an authorization in writing a person concerned in a cognizable offence.

No doubt any officer to whom information of a cognizable offence has been given, or in whose view such an offence has been committed, or who has reasonable ground to suspect a person of such an offence can effect an arrest without a warrant from a magistrate or any other authorization from a superior officer, provided that the officer is acting on his own initiative, or independently in the course of his duty. A beat constable can do so, and constantly does so. The main reason and justification for such a power is necessity. It may also be said that in such cases the person arrested is likely to know the reason for his arrest, and that the person who arrests him is a police officer. But where a subordinate police officer is not acting independently, but is merely deputed by a superior officer to arrest someone concerned in a cognizable offence, a further formality is prescribed, presumably to prevent abuse of the powers of the police, or to allow the person arrested to know the reason for his arrest and the office of the person arresting him.

The provisions of section 54 are limited by those of section 56 of the Code of Criminal Procedure. Section 56 (1) says that when any officer in charge of a police-station, or any police officer making an investigation under Chapter XIV, [that is to say an officer in charge of the police-station, or one of his subordinate officers deputed by him under section 157 (1) Criminal Procedure Code], requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who

may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made. The officer so required shall before making the arrest notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order.

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It is perhaps curious that there is no previous decision directly bearing on the subject, except *Queen v. Sheik Emoo* (1). The Judges were in doubt there whether under the corresponding section of the Code of that time, section 100, any police officer might not arrest a person for dacoity; but the case was decided on another ground, that though the arrest by a police constable was made on the verbal order of the head constable who was enquiring into the dacoity, and not on a written order as required by section 140 of that Code, yet it was made in the head constable's presence and virtually by him.

In the present case it is not alleged that any information had been received by police constable Gunoo Meah, or that he was acting in the case in any other capacity than under the orders of the investigating officer to arrest the present appellant if he found him. I am of the opinion, therefore, that section 56 applies, and that the arrest was not justified under the provisions of that section. It follows that the conviction under section 353 of the Indian Penal Code, was bad, as the police officer was not acting in the execution of his duty. The appellant, however, was liable under section 323 of the Indian Penal Code, for causing hurt to the

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(1) (1869) W.R. (Cr. Rulings) 20.

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police officer executing the warrant, as under section 99 of the Indian Penal Code, there is no right of private defence in a case such as this where a police officer was acting *bona fide* under colour of his office—see *Queen-Empress v. Dalip* (1).

The appellant fisted the police constable once in the face and, it may be added, was struck by the police constable several times with a cane. No very great hurt was caused to the police officer.

The conviction and sentence under section 353, Indian Penal Code, will be set aside, and in lieu thereof the appellant will be convicted under section 323, Indian Penal Code, and the sentence reduced to two months' rigorous imprisonment.

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### SPECIAL BENCH.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mya Bu, and  
 Mr. Justice Sen.

1935  
 July 18.

### THE EXECUTIVE ENGINEER, MANDALAY

v.

### THE MAYMYO MUNICIPALITY.\*

*Municipal assessment—Tax on lands covered by buildings—Projecting eaves—Measurement of building—Plinth area—Land beneath eaves—Taxing statute, construction of—Burma Municipal Act (Burma Act III of 1898), s. 62 (1) (A) (b).*

A municipal committee in imposing a tax on land covered by a building under s. 62 (1) (A) (b) of the Burma Municipal Act must measure the land assessable according to the plinth area of the building, and is not entitled to include in the assessment land beneath the eaves of the building.

No tax can be imposed except by words which are clear, and the benefit of the doubt is the right of the subject.

*Re Finance Act, 1894, and Studdert, 2 I.R. 400—referred to.*

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(1) (1896) I.L.R. 18 All. 246 252.

\* Civil Reference No. 6 of 1935.